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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-6033

SHARON POE AND DOROTHY POE, on behalf of themselves and others similarly situated,

APPELLANTS,

v.

NICHOLAS NORTON, individually, as Commissioner of Welfare of the State of Connecticut, and on behalf of others similarly situated,

APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

CLOSING BRIEF OF APPELLANT MOTHERS

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TABLE OF CONTENTS

Table of Authorities.....below

Argument..... 1

Comity..... 2

Abstention..... 5

Conclusion..... 8

TABLE OF AUTHORITIES

Cases

Broadrick v. Oklahoma 413 U.S. 601, 37 LEd2d 830 (1973) 5

Gibson v. Berryhill 411 U.S. 564 (1973) 1

Harris County Commissioners v. Moore 43 LW 4222 (1975) 5,6

Hostetter v. Idlewild Liquor Corp. 377 U.S. 324, 12 LEd2d 350 ( ) 5

In re Clark 65 Conn. 17, 31 Atl 522 (1895) 4

Lemon v. Kurtzman 411 U.S. 192, (1973) 1

Railroad Commission v. Pullman Co. 312 U.S. 496 85 LEd 971 5

Samuels v. Mackell 401 U.S. 37, 27 LEd2d 669 (1971) 1

Sosna v. Iowa __ U.S.___, 42 LEd2d 532 (1975) 3,7

Younger v. Harris 401 U.S. 60, 27 LEd2d 688 (1971) 1,4

Statutes and Rules

Rule 23, Federal Rules of Civil Procedure 3

Conn. Gen. Stats. Section 52-29 7

Conn. Gen. Stats. Section 52-440b ..... passim.

Conn. Practic Book Sections 307-312, esp 309(d).....7

Appellant mothers concur largely with the positions taken by counsel for the children in their supplemental brief, and add this closing statement showing that sound judicial policy also dictates decision of their claims on the merits by the federal courts. The appellant class of mothers respectfully urges the Court to reverse the District Court decision denying them requested declaratory and injunctive relief.

Appellants respectfully submit that neither comity nor abstention, both equitable doctrines molded in a case by case fashion to resolve sometimes delicate questions of federalism, should be applied to this case, and that the practical realities necessitate decision on the merits in the federal courts. As the Court stated in Lemon v. Kurtzman 411 U.S. 192, 201:

> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests,...

This brief will examine those practical realities of federalism involved in this case.

A. COMITY

Younger v. Harris 401 U.S. 37, 27 LEd2d 669 (1971) and Samuels v. Mackell 401 U.S. 60, 27 LEd2d 688 (1971) did not remove federal District Court jurisdiction over constitutional questions pending in proceedings in state courts. Nor did they require nonintervention in all cases in which such questions were pending. Rather, both directed District Courts to predicate exercise of their equitable jurisdiction on the familiar principle that a court should not exercise its equitable jurisdiction except in the absence of an adequate remedy at law. The Court's application of this familiar doctrine to instances in which Federal Courts are asked to enjoin state criminal proceedings was to direct the District Courts to defer to those pending state criminal proceedings they found adequately designed to vindicate the federal rights in question, with some exceptions. See also Gibson v. Berryhill 411 U.S. 564 (1973). At base it is a doctrine of deference to

the good faith and competence of state judges in those cases where the latter have power to act effectively.

Appellants submit that it is inappropriate for the Court to decline to exercise jurisdiction over this case on the basis of comity, for several reasons. In the cases of the two plaintiff mothers here, the trial courts (state) have shown no desire to decide the cases. On the contrary, they have twice granted stays on the representations of both counsel that federal constitutional questions of fundamental relevance were pending in the federal courts[1]. And at present the cases have been removed to an inactive list to permit final determination of those issues by this court. Children's S.B. App. 3a, 13a. Thus the state courts do not consider federal decision to be unwarranted interference with their pending proceedings. On the contrary, although they have not predicated the stays explicitly on the doctrine of trial court incompetence, they have welcomed the federal courts' exercise of their civil rights act jurisdiction. Counsel for the Appellee apparently concurs with the mothers and childrens desire for a definitive ruling. See Children's S.B, 25. There is nothing in the District Court record which supports the inference that counsel there, who was an experienced federal litigator, did not desire adjudication on the merits[2]. On the contrary, the Answer denied only the conclusions drawn in the complaint; further it raised no questions of comity or of abstention. App, 55.

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1. At oral argument February 25, 1975 the undersigned represented that the mothers had placed the constitutionality of the statute in question in state court. In fact, a review of the records show that this was done only as a part of motions to stay proceedings, and not by formal responsive pleading. In responding the the motion for a stay, the attorney for the Commissioner raised the question of the state court's competence to declare the statute unconstitutional. Children's S.B. Ap., 28a.

2. Nor is there a possibility that either court or defendant was misled about the pendency of the petitions since appellants alleged the same in their complaint, App. 6, admitted, App. 55.

And the state's brief here, like its brief below, is confined exclusively to the merits. Since the purpose of comity is deference to available state proceedings, and the state proceedings here have claimed no such deference, appellants can perceive no reason this Court should not decide the merits, a position apparently concurred in by Connecticut's judiciary and executive branch. See Sosna v. Iowa __U.S.___, 42 LEd2d 532, n.3, (1975).

Nor is it apparent that the considerations of federalism informing the comity doctrine require any deference to state courts where issues arising under the supremacy clause, viz. the claims here arising under the Social Security Act, are made. Even if Younger questions could not generally be waived, appellants can see no reason to fail to recognize waiver where, as here, supremacy clause issues may well be dispositive.

Even if there were disagreement between the parties over the comity question, or a waiver were not recognized, this is not an appropriate case to preclude federal decision based on the Younger doctrine. The District Court found, without objection that the case was properly maintainable as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure (F. R. Civ. P), and designated subclasses of mothers and children. Thus it found appellants to be appropriate representatives of a subclass of mothers which it defined without regard to the pendency of state proceedings, App, 131. To deprive those members of the class not yet parties to a state proceeding of an adjudication as a class in this action would be contrary to the civil rights act and Rule 23 where there is no conflict of interest among class members and no apparent doubt of the competence with which the issues have been presented. Equally significant, it would merely necessitate a new federal action by other members of the class, great duplication of effort by all concerned, some delay,

and (given the District Court's decision below) , almost certain review by this Court.

The invasion of the mothers constitutional right to privacy accomplished by Section 52-440b occurs well before petitions to compel disclosure are brought in state court, with the mandatory decision of the Welfare Department to intervene, App. 11. 'Thus a defence to such a petition could never, because of the nature of the right, and of the violation, vindicate the right. This is so quite apart from the actual adequacy of state remedies in the pending proceeding. And the remedies available in this case are no more adequate to protect the mothers rights than they are to protect the interests of children. See Children's S.B. 21-24.

Refusal of the federal courts to decide this case under the Younger doctrine is also inappropriate where, as here, the plaintiffs attack the public nature of and failure to provide adequate procedures in, that very state proceeding which is pending. This is particularly true where the state courts have held, as Connecticut's have, that the type of proceeding in question is not subject to due process safeguards. See In re Clark 65 Conn. 17, 31 Atl 522 (1895).

Finally, the state has consistently maintained that petitions under C.G.S. Section 52-440b are civil in nature [3]. Even if that conclusion were incorrect, it would nonetheless serve to indicate that Connecticut has ascribed a lesser importance to unencumbered enforcement than would be the case if it denominated such petitions civil. Cf Younger v. Harris (supra) at 55, n.2. (Stewart, J, concurring). To date this Court has declined to extend the Younger doctrine to civil cases. Appellants submit that the present case is a singularly inappropriate one for such an

3. Counsel reiterated this position at oral argument.

extension, for all of the several reasons outlined above.

B. ABSTENTION

The reasons cited for indicating that federal courts should abstain from decision on federal constitutional questions within their jurisdiction are the possibility of an adjudication of a state law question by state courts so as to 1) obviate the necessity for any federal constitutional adjudication, Railroad Commission v. Pullman Co. 312 U.S. 496, 85 LEd 971, or 2)significantly modify the federal claim, Harris County Commissioners v. Moore __U.S. ___, 43 LW 4222 (1975). To the extent that it relies on assumed superiority of state courts to determine questions of state law, the considerations set out regarding comity are equally applicable to Pullman abstention .

This Court has on at least two occasions declined, after raising an abstention question sua sponte, to look behind a desire of the parties for decision on the merits, Hostetter v. Idlewild Liquor Corp. 377 U.S. 324 (1964), Broadrick v. Oklahoma 413 U.S. 601, 37 LEd2d 830 (1973). A sound reason for that policy is that unless a party raises such questions, the Court can generally assume that there is none dispositive of the case and the parties cannot be assumed to be relying on any particular interpretation of state law. In this case neither the State of Connecticut nor the Court raised any questions of state law which could conceiably dispose of the case favorably to plaintiffs without adjudication of the federal questions. Nor has there been any suggestion of any unsettled questions of state law of substantial importance to the federal issues. And the statute clearly could not be upheld without adjudication of the several constitutional claims. On the contrary the briefs of all parties are confined almost exclusively to argument on the merits of the

federal claims raised. And appellee's claims about state law matters argue not that the plaintiff class might be entitled to a declaratory judgment in state court, or even that the basic claims here would be put in a different setting, but at most that other classes may be similarly disadvantaged [4].

This is an inappropriate case for abstention. While there may be undecided questions of state law of marginal relevance to some claims, viz, availability of appointed counsel for mothers or guardians ad litem for children, neither the District Court nor the parties relied on a particular interpretation of these issues, App. 139, n.14. Such questions could not be dispositive of this case or of a hypothetical class action brought in state court. There are, to appellant's knowledge no serious unsettled state law questions relevant to appellants substantive claims: conflict with the Social Security Act and violation of their right to privacy. Nor is there state court authority favorable to the position appellants would have to assert in state court, compare Harris County Commissioners v. Moore (supra). There is, in short, no state law question of which counsel is aware which is substantial enough to warrant, much less to mandate, abstention in this case.

There is, of course, no lack of state administrative interpretation of Section 52-440b; appellants seek, inter alia, to enjoin enforcement of Department administrative policies implementing the statute, App. 11. Several trial courts have had the opportunity to construe the statute and have not narrowed it to avoid the constitutional claims appellants raise, Children's Br. App. 7a-48a, Amicus Br. App. 1a-44a. Nor are state appellate courts likely to resolve any such issues since review is at most restricted and at worst nonexistent, See Children's S.B. 21-24. The second premise for abstention,

that there is at least a substantial possibility of a state court construction which would significantly modify the federal issues, is lacking here .

Even if the waiver were disregarded, the undecided questions were of great significance, and there were a substantial possibility of state constructions which would avoid the necessity of constitutional adjudication in the case of individual appellant's abstention would not be indicated here. Connecticut has no class action provision comparable to Rule 23 F. R. Civ. P. In order to proceed on behalf of the class, appellants would have to initiate a declaratory judgment action and give notice to all class members; Conn. Gen. Stats Section 52-29, Conn. Practice Book Sections 307-312. See, Especially P.B. Section 309(d). Compare Rule 23(b)(2) F.R. Civ. P. And see Sosna v. Iowa __U. S. ___, 42 LEd2d 532, 539, n. 4 (1975). Obviously they cannot afford to do so. An attempt to raise all such issues defensively might fail and in any case would result in truncated adjudication, substantial delays and vast duplication of effort. Quite apart from the procedural difficulties with direct or habeas corpus review of 52-440b decisions by appellate courts, and from the Townsend doctrine (See Children's S.B. 21-22), there is simply no adequate, actually available state remedy the appellant class could utilize to obtain a determination of any such undecided questions. Under the circumstances, abstention is inappropriate.

CONCLUSION

In applying the policy considerations underlying the equitable principles developed regarding federalism to the case at bar, it is clear that neither considerations of comity nor the doctrine of abstention is appropriately applied to relegate appellant mothers to their state courts and remedies. This case is, at this time, fully appropriate for federal decision on appellants requests for declaratory and injunctive relief.

RESPECTFULLY SUBMITTED

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This is to certify that on the 13th day of March, 1975, copies of the foregoing were mailed postage prepaid to counsel of record: Michael A. Arcari, Esq, Assistant Attorney General, 90 Brainard Road, Hartford, Conn. and Rosen and Dolan, 265 Church Street, New Haven, Connecticut.